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Supreme Court of the United States

OCTOBER TERM, 1941

No. 664

BOSTON AND MAINE RAILROAD,
Petitioner

vs.

JAMES CUNNINGHAM,
Respondent

RESPONDENT'S BRIEF

This is a petition for a Writ of Certiorari to review the decision of the Supreme Judicial Court of Massachusetts in an action of tort under the Federal Employers' Liability Act (45 U. S. Code Annotated, Sections 51 to 59) for personal injuries sustained by an employee (the respondent herein) engaged in interstate commerce, of an interstate common carrier by railroad.

STATEMENT OF FACTS

The facts in this case are clearly set forth in the "Transcript of Record" on Pages 2, 3, 4 and 5.

MISSTATEMENTS IN FACTS SET OUT IN PETITIONER'S PETITION AND BRIEF

On Page 2 of Petition, line two refers to "a baggage truck operated by fellow employees."

The Record, Page 2, fourth paragraph, line six says "That he saw three fellow employees pushing a two-wheeled truck with a box on it," etc.

On Page 2 of Petition, line 3—"The defendant's answer was a general denial, contributory negligence and assumption of risk."

The Record, Page 7, shows the answer to be a general denial and contributory negligence.

On Page 2 of Petition, last line, and Page 3, line six, it is stated that judgment was entered on July 9, 1941.

The Record, Page 12, "Certificate of Judgment" sets forth that judgment was entered on July 7, 1941.

On Page 6 of Brief in Support of Petition, line sixteen, it appears "that he did not report his alleged accident as required by the rules of his employment until December 30, 1937; on Page 8 of said Brief in Support of Petition, last paragraph, line three, it again appears "He admitted he did not report an accident until December 30, 1937;" on Page 9 of said Brief in Support of Petition, second paragraph, line eight, it again appears "he denied the fact of an accident until December 30, 1937, eleven months after the accident is said to have happened"; on Page 11 of said Brief, second paragraph, line five it again appears

"As pointed out above, for nearly a year he denied the very fact of an accident"; on Page 13 of said Brief, second paragraph, line twelve, it again appears "As against this, it must be realized that for nearly a year the plaintiff made no claim of any accident."

The respondent respectfully says that no where in the "Transcript of Record" does any such statement appear.

On Page 6 of Brief in Support of Petition, line twenty-one, it appears "that no mention was made of an accident on his hospital record"; on Page 8 of said Brief in Support of Petition, last paragraph, line four, it again appears "He admitted that in his hospital record no mention was made of an accident; on Page 9 of said Brief in Support of Petition, second paragraph, line fifteen, it again appears "By his failure to mention any accident in his hospital record."

The record, Page 4, last paragraph, line eight, is an explanation by the family physician as follows: "his family physician testified that the reason he did not include it in the hospital record was because the plaintiff requested him not to do so as he (plaintiff) said he was afraid he would be fired if it was so included in the hospital record.

On Page 11 of Brief in Support of Petition, second paragraph, line eleven, it is said "it was a large box."

The respondent submits that there is no such statement in the Record and calls the attention of the Court to the Record, Page 4, top of page.

"A. The truck come down, the box was probably about that long over the shafts."

The respondent by this statement illustrated to the jury the size of the box.

ISSUES

I. ON THE "TRANSCRIPT OF RECORD" SHOULD AN ORDER DENYING CERTIORARI BE ENTERED?

II. WAS THERE SUFFICIENT EVIDENCE OF NEGLIGENCE TO GO TO THE JURY?

III. DID THE RESPONDENT ASSUME THE RISK?

ARGUMENT

I. ON THE "TRANSCRIPT OF RECORD" SHOULD AN ORDER DENYING CERTIORARI BE ENTERED?

The respondent submits that on the "Transcript of Record" an order denying Certiorari should be entered.

The respondent submits that the province of this Honorable Court is to decide as a matter of law whether on the record certiorari should be granted.

Chicago, Milwaukee & St. Paul Ry. Co. vs. Coogan 271 *U. S.* 472.

In this connection the respondent calls to the attention of the Court, the Record, Page 1, third paragraph, line three, which says: "The case was submitted to the jury under appropriate instructions as to negligence, contributory negligence, assumption of the risk and as to damages to which instructions no exceptions were taken." The Court properly instructed the jury as to negligence, contributory negligence, assumption of the risk and as to damages under the Federal law with reference to the Federal Employers' Liability Act.

The respondent submits that the Record clearly shows that as a matter of law an order denying certiorari should be entered.

II. WAS THERE SUFFICIENT EVIDENCE OF NEGLIGENCE TO GO TO THE JURY?

The respondent submits in answer to petitioner's Petition, Page 3 entitled "Questions Presented" as to whether "there was an accident," as to whether "it was caused by the negligence of the defendant, its servants or agents," as to whether "the plaintiff was not contributorily negligent" and as to whether "the plaintiff did not assume the risk" were all questions of fact for the jury.

As to the first "Question Presented":

1. Was there an accident?

The Record on Pages 2 and 3 set forth that there was an accident, not only that the respondent was struck by his three fellow employees but Page 3, line eight, "The plaintiff was pulled back up upon the platform by the said three fellow employees." On Page 4, fourth paragraph—"The defendant offered no explanation as to how the accident happened." The respondent submits that this was a question of fact for the jury, and, the jury could find, in addition to the above stated reasons, that by virtue of the fact that the petitioner offered no evidence to explain this accident (Record, Page 4), although the explanation, if any, was within the control of the petitioner's three employees, the only fair inference to be drawn by the lack of explanation being that there was no explanation and no other cause for the accident except the carelessness and negligence of petitioner's employees.

As to the second "Question Presented":

2. Whether it was caused by the negligence of the defendant, its servants or agents?

Negligence has been defined to be the absence of care according to the circumstances and is always a question for the jury when there is reasonable doubt as to the facts, or as to the inferences to be drawn from them. When the measure of duty is ordinary and reasonable care, and the degree of care varies according to circumstances, the question of negligence is necessarily for the jury.

Warner vs. Baltimore & Ohio—168 *U. S.* 339 *at* 348.

Negligence only becomes a question of law to be taken from the jury when the facts are such that fair-minded men can only draw from them the inference that there was no negligence. If fair-minded men, from the facts admitted, or conflicting testimony, may honestly draw different conclusions as to the negligence charged, the question is not one of law but of fact and to be settled by the jury under proper instructions.

McDermott vs. Severe—202 *U. S.* 600 *at* 604.

In the case of Moran vs. Plymouth Rubber Company—307 Mass. 344, which case also involved a two-wheel hand truck, the Court upheld the plaintiff on the question "whether there was evidence to go to the jury."

The respondent in the case at bar submits that the evidence of defendant's employees' negligence is stronger than the Moran Case. The respondent submits that there was enough to support a finding that the respondent's injury was caused by negligence of the defendant's employees. The two-wheeled hand truck which struck the respondent (Record, Page 3) was of such size, shape and construction that it could be handled with reasonable

facility and could be turned or stopped to meet such conditions as would be likely to arise where workmen were about. The jury could infer that if the respondent saw his fellow employees pushing their truck eighty feet away in his direction that the employees could have seen the respondent and had sufficient time to stop or continue on their right-hand side of the platform instead of changing their course, speeding up, crossing to respondent's side of platform and crowding in on the respondent thereby pushing their truck against him.—Record, Pages 2 and 3.

The respondent further submits that the jury could find that the petitioner's employees had an unobstructed view of all that was happening in front of them; that they could have seen the respondent in front of them on the platform; that from all the evidence the jury could infer that the petitioner's employees were negligent either in failing to observe the respondent or in failing to stop or in pushing their truck too fast or too near the respondent.

In the case of Illinois Central Railroad Co. vs. Porter—207 Fed. 311 at 314, a somewhat similar set of facts existed as in the case at bar, involving a trucker of a railroad engaged in similar work as the respondent in this case. The Court held—"The evidence was sufficient to support a conclusion that the fellow truckman negligently collided with decedent."

The above case was followed in Grosvenor vs. New York Central Railroad Co.—343 Missouri 611 at 621.

As to the third "Question Presented":

3. Whether the plaintiff was not contributorily negligent?

On the question of contributory negligence the respondent submits that on the Record there is no evidence of

contributory negligence and if the plaintiff was guilty of contributory negligence, which is expressly denied, under the Federal Employers' Liability Act it would only lessen the amount of respondent's damages.

III. DID THE RESPONDENT ASSUME THE RISK?

The respondent submits that he did not assume the risk.

The respondent submits that the doctrine of assumption of the risk under the Federal Employers' Liability Act is clearly set forth by the Massachusetts Supreme Judicial Court as follows:—

"But there is no voluntary assumption of the risk of the carelessness of a fellow servant, not obvious nor fully known and appreciated by the plaintiff in season to enable him to judge of the danger and to decide whether to assume the risk involved."

Hietala vs. Boston & Albany Railroad—295 *Mass.* 186 *at* 192.—*certiorari denied* 299 *U. S.* 589.

Hanley vs. Boston & Maine Railroad—286 *Mass.* 390 *at* 397.

Illinois Central Railroad vs. Porter—207 *Fed.* 311 *at* 315.

Texas & Pacific Railroad vs. Behymer—189 *U. S.* 468 *at* 470.

The respondent submits that the petitioner offered no evidence of an assumption of the risk except what appears in Record, second and third paragraphs of Page 4.

CONCLUSION

Upon the "Transcript of Record" and the law applicable thereto the respondent submits that the cause here presented for review does not constitute "an utter and complete disregard by the Supreme Court of Massachusetts of those principles enunciated by the Supreme Court of the United States"—"in construing the provisions of the Federal Employers' Liability Act" as set forth in Petition for Writ of Certiorari Page 4 entitled "Reasons for Granting the Writ" but demonstrates definitely in its Opinion (Record, Pages 8, 9, 10 and 11) an intelligent compliance and understanding of the principles involved.

The respondent respectfully submits:—

1. That on the "Transcript of Record" an order denying Certiorari should be entered.
2. That there was sufficient evidence of negligence to go to the Jury.
3. That the respondent did not assume the risk.

WHEREFORE, the respondent respectfully prays that the Petition for a Writ of Certiorari be dismissed and an Order Denying Certiorari be entered.

Respectfully submitted,

JAMES CUNNINGHAM,

Respondent-Pro-Se.